

FOR THE RIGHT TO SILENCE

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Abstract

This article explores some of the changes regarding the right to silence that have flowed from the passage of the so-called ‘anti-terror laws’, particularly the amendments to the ASIO Act (1979). It finds that the right has been significantly weakened through a number of provisions in the legislation. The writer contends that the judicial protection of the accused, embodied in the right to silence, is fundamental to the workings of an efficient and moral judicial system despite the seemingly overriding imperatives of national security. It argues that the loss of the right to silence neither serves the prosecution of terrorists, nor the bolstering of investigative procedures to apprehend them, but in fact weakens such processes and the democratic basis of the Australian judicial system in the rule of law.

“Innocence claims the right of speaking, as guilt invokes the privilege of silence”

- Jeremy Bentham (Bentham, 1827)¹

Introduction

The right to silence is a fundamental principle of Australian criminal law and lies at the centre of legal rules excluding involuntary and improper confessions. In recent years however, this long held established legal protection has been under concerted political attack and is straining considerably. Sweeping changes to the right, “rammed” through parliament in the wake of the September 11 terrorist attacks in the United States, have radically and detrimentally altered the principle of the right to silence within the Australian criminal legal system (Topsfield, 2005). These wide-sweeping changes, and the lack of a concerted opposition against them, represent a fundamental normative shift in the legal principles governing the Australian judicial system. The successful - and undebated - passage of many aspects of the ‘anti-terror’ laws represents an unabashed victory for the proponents of over-zealous law enforcement agencies against the rights of the accused and with this loss comes the moral questioning of our commitment to

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liberalism and the protection of the individual.

This article explores the contemporary status of the right to silence in the Australian legal system and the changes to this principle primarily under the *Australian Security Intelligence Agency Act 1979* (Cth).² It shall argue for the re-strengthening of the right to silence by revealing the inherent dangers of the alteration to this fundamental principle of criminal procedure. It shall be argued that detrimental changes to the right to silence are both an affront to basic common law principles and democratic values. Moreover, it shall posit that the anti-terror laws are corrosive of the two fundamental principles that underpin the Australian criminal law, namely; that the judicial system is geared to the ascertainment of the truth; and that the judicial system operates fairly to the accused (Zander, 1998: 15-17).

While the right to silence is usually viewed, unfortunately, as being primarily an issue of law this article takes a much more expansive view of the problem. While it gives an overview of the status of right to silence in Australian law, the argument for its retention is based on philosophical reasons – protection of the individual, reasonableness of confession, and the maintenance of the democratic ethos. While scholars of jurisprudence tend to focus on legal arguments for or against the right to silence, little work has been done that concentrates on the philosophical and political legitimacy for the right to silence which is the purview of this article. The first part of the article gives a general overview of the status of the right to silence in Australian law and the second part addresses the changes to it brought about by the passage of the anti-terror laws.

The Right to Silence in Australia

Judicial restraints and limitations on policing methods form an integral part of any democratic system's protection of the individual. The rights of the accused, which includes the right to silence and all other forms of due process, are essential to the workings of a democracy based on the rule, as it is such safeguards that legitimises the state's monopoly of coercive violence in the exercise of criminal law (Crelinsten, Ozkut, 1996: 8). One of the

² Australian Security Intelligence Act 1979, Act No. 113, of 1979, as amended, Act No. 21, 2007. Also of interest are The Anti-Terrorism Act (2004), No. 104, 2004 and The Anti-Terrorism (No. 2) Act (2005), which

most important principles of the rule of law, established progressively since the *Magna Carta*, is that the state ought not to have arbitrary power to interfere with the liberties of any citizen. From these ancient beginnings has grown the principle that no citizen is under obligation to answer questions from any government official, whether or not the government was acting lawfully in detaining that person for any length of time (Law Council of Australia, 2002). The right to silence stems from this principle and is essentially a common law right that has been given a degree of statutory recognition within Australian law (for examples, *Crimes Act 1958* (Vic): s464J). Yet as found by Lord Mustill in *Smith v. Director of Serious Fraud Office*³, the right to silence does not denote any single right but rather refers to a disparate group of immunities which allow a person to refuse to answer questions put to him or her by persons in authority. At its most fundamental level, the right to silence provides that a person who believes on reasonable grounds that he or she is suspected of an offence is entitled to remain silent. The central tenet of the principle is that silence can never amount to an admission if it is occasioned by the conscious exercise of a known right to remain silent, whether the suspect has been told of this right or not (*R v. Bruce*).⁴ While I do not wish to detail at length the legal status of the right to silence, some general background is necessary to understand the gravity of the changes that the ASIO Amendment provides.

There has been subtle erosion of the principle of the right to silence by the judiciary proceeding the passage of the anti-terror laws. This gradual weakening of the right was first evidenced in the decision of *Woon v R*⁵ which allowed evasive and selective answering of questions to be used as evidence showing consciousness of guilt. The case held that an inference of consciousness of guilt may be drawn from conduct or demeanour (which may include silence) when taken in combination with other evidence. In this case, the accused was willing to talk with police (although he refused to answer some questions) but showed his consciousness of guilt by what he said. Moreover, in *R v Alexander*,⁶ inferences of guilt were held to be permissible where the accused failed to protest his innocence during a conversation with his friends about the suspected murder of his wife. In an English study, it was found that in the majority of cases where the accused had exercised their pre-trial right of

allows for detention under the New Division 105 of the Criminal Code.

³ (1993) AC 30-31.

⁴ [1998] VR 579, 593.

⁵ (1964) 109 CLR 529.

silence that the jury were made aware of this (Zander and Henderson, 1993: 145) and though we must presume that in all cases that the jury were directed by the judge to not impute this as evidence of guilt, the prejudicial affect, regardless of the judge's direction, cannot be denied.

The problems stemming from the prejudicial affect of the exercise of the right to silence was identified in *R v Reeves*.⁷ In this case it was held that where evidence is given which discloses the accused had exercised their right of silence that a direction should invariably be given to the jury to make it clear that the accused had a fundamental right to remain silent and that this exercise must not lead to any conclusion. However, despite this ruling as seeming to bolster the right to silence, the case represents a watershed decidedly in the other direction. The consequence of the decision was to deform the rule which had ensured that the accused's exercise of their pre-trial right of silence was inadmissible against them into a rule about how juries should be instructed (Aronson, 1998: 521). It is highly questionable whether juries can perform such "mental gymnastics" (Williams, 1994: 629) and overcome their own subjective impression of the silence of the accused regardless of a clear, unambiguous direction from the judge. Though this criticism predominantly attacks the pre-texts of the jury system its pernicious effect on the right to silence is yet further evidence of the myriad of problems the exercise of the right to silence entails.

One of the most clear elaborations on the Australian right to silence was given in *R v. Weissensteiner*.⁸ In this case, the High Court recognised the right to silence as a fundamental common law right within Australian law. However, as Bagaric has argued, this positive re-statement of the established common law principle by the High Court was "more fanciful than real" as the distinctions made in the judgement entailed that the scope of the right was in fact significantly limited (1997: 366-367).

The case against Weissensteiner was circumstantial and at the trial the accused remained silent. There was no obligation on the accused to give evidence and guilt could not be inferred from his failure to do so, and consequently, there was no evidence from him to refute the

⁶ [1994] 2 VR 258-263.

⁷ (1992) 29 NSWLR 109, 115.

prosecution evidence (Bagaric, 1997: 370). On appeal, the majority judgement stated that “[i]t is only when the failure of the accused to give evidence is a circumstance which may bear upon the probative value of the evidence which has been given... that they [the jury] may take it into account only for the purpose of evaluating that evidence”⁹. For the court, the accused’s silence could be used against him or her where the failure to give evidence was “clearly capable” of assisting the jury in the evaluation of the evidence and the exercise of the right to silence at a trial could itself warrant the drawing of unfavourable inferences. According to *Weissensteiner*, failure to testify could be used as a basis for concluding that there are no reasonable hypotheses consistent with innocence, and that guilt has accordingly been proven beyond a reasonable doubt. *Weissensteiner* reveals that the exercise of the right to silence can be used against the accused where the failure to testify may mean that prosecution evidence remains uncontradicted (Williams, 1994: 629). Consequently, a corrosive pattern against the right to silence is clearly discernible in recent case law which reveals that the strength of the right is to a large extent illusory, even without the recent promulgation of anti-terror legislation.

The ASIO Amendment and the Right to Silence

The amendments to the *ASIO Act 1979* (Cth) has further eroded the right to silence, effectively terminating it for those suspected of terrorism, and even for those persons only ancillary to the investigation of terrorism. Provisions in s 34E, under Division 3, of the Act provides that under issue of a questioning warrant that the detainee must give information, and/or produce records or things that may be relevant, or important, to a terrorism offence.¹⁰ Furthermore, s34L(2) provides that a person “must not fail to give any information requested”, or fail to produce any records or documents, that are requested under warrant. Such a provision allows for the detainee to be liable for offences colloquially known as “lack of cooperation” (Wyndham, 2003) and s34L(2) provides that failure to comply with questioning carries a penalty of five years imprisonment.¹¹ The Senate Legal and

⁸ (1993) 178 CLR.

⁹ *Ibid*, 1993: Mason CJ, Deane and Dawson JJ, 239.

¹⁰ See *ASIO Act 1979 (Cwth)*, s 34E(4)(a)(i) and (ii). Similar provisions are repeated in 34G, 7(a)(i) and (ii) regarding the issuing of questioning and detention warrants.

¹¹ Section 34L “Giving information and producing things etc.” of the *ASIO Act 1979 (Cwth)*, provides that: (1) *A person must appear before a prescribed authority for questioning, in accordance with a warrant issued under this Division or a direction given under section 34K.*

Constitutional Legislation Committee consequently determined that there was *no* right to silence in the Act (2002: 5) and Das and Kratcoski have demonstrated how such provisions have imperilled the rule of law and significantly undermined established judicial procedures (2003).

The right to silence has essentially been abrogated for detainees under the ASIO Act who, by their refusal to answer any questions, risk imprisonment (Hocking, 2003: 357). Most disconcerting is the fact that ASIO agents would be thus empowered to act accordingly against anyone, including children, and even those not suspected of terrorism, evincing an abandonment of many fundamental legal protections in the investigation of terrorist-related activities (Emerton, 2006). The Senate Standing Committee for the Scrutiny of Bills condemned this aspect of the legislation as it allowed for the detention of persons for the purpose of collecting information, not just for the investigation of an offence (2002: 4-7). These extreme powers conferred under the ASIO Act expose an arrant lack of faith by parliament and the executive in the ability of the Australian police forces because the underlying assumption is that the capacities of policing need strengthening at the price of certain civil liberties. In light of the numerous federal police blunderings in the Haneef case this consternation may not be unfounded (Skehan, May and Dhillon, 2007). Arguably, the principal necessity in combating terrorism lies in the need of extra resources and skilled personal, not in the attainment of clandestine powers. Professor Williams has warned that ASIO is not an enforcement body and that if it is to be granted coercive police powers, such as contained in the amendment, that legislation must subject the organisation to the same political and community scrutiny and controls that apply to any other police force (Williams, 2002: 201-252).

The offence of failing to give the information, record, or thing requested in interrogation in s34L can be regarded as effectively *reversing* the onus of proof from the investigative and prosecution powers of the Crown onto the accused. That is, in s34L it is the

Penalty: Imprisonment for 5 years.

(2) A person who is before a prescribed authority for questioning under a warrant issued under this Division must not fail to give any information requested in accordance with the warrant.

Penalty: Imprisonment for 5 years.

(3) Subsection (2) does not apply if the person does not have the information. Note: A defendant bears an evidential burden in relation to the matter in subsection (3) (see subsection 13.3(3) of the Criminal Code).

It should be noted that sub-section 8 provides that this duty to provide information includes information that incriminates the person, though under sub-section 9 these admissions are not admissible against the person in other criminal proceedings.

person being interrogated that must prove that they *do not* have the information to escape prosecution which logically forms an irresistible compulsion to speak in bearing this evidential burden. In this sense, this provision shifts judicial principles toward the inquisitorial approach requiring the accused to provide evidence to refute the state's case rather than compelling the prosecution to adduce evidence to support the charge. The reversal of the onus of proof was opposed by several submissions, including the Law Council of Australia (The Age, 2005) and Amnesty International, which objected that the 'reverse onus' also violates the presumption of innocence (see Senate Legal and Constitutional Committee, 2003: 6.53-6.55).

The imperatives of national-security and the protection of Australian democracy against terrorism have been the assumed justification, the *raison d'être*, behind the gamut of anti-terror laws. However, as Bagaric has argued, the prospect of utilitarian gains – including that of national security - cannot justify preventing a man from doing what he has a right to do (Bagaric, 1997: 375). Moreover, Chalk argues that the institutionalised counter-terrorist policies may pose an even greater threat to democratic freedoms than the terrorists themselves (Chalk, 1998: 373). The question is, if we abrogate our democratic rights, how are we to distinguish ourselves from the terrorist threat that we are attempting to secure ourselves from? Wardlaw had gone so far as to argue “that depriving citizens of their individual rights... is to put oneself on the same moral plane as the terrorists who believe the ‘end justifies the means’” (Wardlaw, 1989: 69). Ultimately, if the legislative response to terrorism is the rejection of constraints on state power established by the rule of law, then terrorism prevails at the expense of our own political rights (Abbott, 2002: 3). As Lynch and Williams warn, we must not let ourselves become the victim to our own fears (2006).

Although the ASIO amendments do not compel a detainee to speak, by providing that silence may result in five years imprisonment irrefutably constitutes an irresistible, and possibly, a coercive pressure to do so. The threat of imprisonment can be seen to border on coercion when we couple it with the other investigative powers given to agents by the Act, such as the lengthy amount of time available for questioning (*ASIO Act 1979 (Cth)*: s34R). The element of fear that the accused would necessarily possess in such circumstances would be palpable and is geared solely towards the coercion of the detainee. This begs the question

of the veracity of such ‘information hunting’ expeditions. If a detainee were compelled to speak, solely for fear of imprisonment, then doubts must seriously be raised as to the degree of reliability that could be attached to information obtained by such duress.¹² Moreover, the new ASIO powers force the accused into believing that the only way to remain free is to disclose all requested information. Not only would this ultimately lead to capricious testimony but it could be stridently argued that this amounts to an inducement and therefore contrary to specific provisions in the rules of evidence (For example the *Evidence Act 1958 (Vic)*: s149).

Questions must also be raised as to the rational efficacy and worth of information obtained by such means. As Hocking writes, under the anti-terror laws it is the provision of information, regardless of its veracity, that has become the sole means of preventing one’s own imprisonment. This allows for unsubstantiated reporting, all too reminiscent of the probing, witch-hunt techniques of McCarthyism (Hocking, 2003: 400). While some argue that the right to silence obscures the search for the truth, it can be countered that it actually facilitates that goal by reducing the risk of false confessions. History shows us that the compulsion to speak can and does lead to gross distortions of the truth and the example of the Birmingham Six provides irrefutable evidence of this. Under the rationalist model of the judicial system, the right to silence provides a fundamental benefit in the ascertainment of the truth amidst the plurality of competing truth-claims. Testimony that is produced under pressure, particularly the threat of imprisonment, may be unreliable and consequently the right to silence can be seen as consistent with the goal of rectitude (Easton, 1998: 170-179). The right to silence is thus best accounted for not just as a judicial protection but as a feature of the criminal justice system which is required as a functional necessity. As the police and ASIO agents endeavour to lay the foundations for the construction of a case against a terror suspect rather than for an impartial inquiry, the accused’s right to silence is the only genuine safeguard at his or her immediate disposal. As Easton surmises correctly, “[f]ar from undermining the objective of rectitude, the right to silence may be instrumental in achieving it, in forcing the police to search more widely for probative evidence”(Easton, 1998: 170-179). An investigative procedure that encourages the prosecution

¹² It is possible that the anti-terror laws would also offend other common law principles such as judicial exclusionary discretions of *Bunning v. Cross* (1978) 141 CLR 54, and *R v. Lee* (1950) 82 CLR 133. The anti-terror laws would render these broad discretions useless, as an inference could be drawn from silence which would be inherently unfair (Lee) and could even be argued to be obtained improperly (Bunning and Cross).

to gather additional evidence other than merely the suspect's admissions should be considered as crucial in facilitating the ascertainment of the truth and can only lead to a strengthening of the criminal process rather than detract from it.

Similarly, the moral authority of judicial decisions may become impugned if it were achieved through the violation of the right to silence. It is clearly essential that for criminal law to be effective and to maintain legitimacy that verdicts must be held by the community to possess moral authority (Sprige, 1987: 216-217). Yet, the erosion of the right to silence raises questions concerning the legitimacy of the confession obtained for it may be factually unreliable (as the detainee is compelled to say *something* to gain their freedom), or misused to compel other incriminating evidence (as in the Haneef case where statements made during interrogation were relied on for prosecution) (The Australian, 2007). If either of these risks materialises the legitimacy of the criminal verdict may be compromised in the eyes of the public. While the Haneef case was made pursuant to s1C of the Crimes Act, and not the ASIO Amendment, its example nevertheless highlights the danger of the loss of the right to silence because in the first instance Haneef freely gave information and denied legal representation. This information was then used against him. This example not only illustrates how the fear of remaining silent can be construed by suspects in certain circumstances but also how effective legal representation (that Haneef subsequently relied on) was able to protect the suspect against such oppressive investigative strategies.

It was Jeremy Bentham who first abstracted human nature to such a degree that he could generalise that it is innocence that claims the right of speaking and guilt that invokes the privilege of silence (Menlowe, 1988: 287). Utility was to override judicial protections of the accused and it is this ontological assumption that continues to captivate the imagination of our legislators and has now pervaded our system of justice through the wide sweep of the anti-terror laws. It is common for critics of the right to silence to claim, on unfounded grounds, that it is professional criminals who disproportionately take advantage of, and abuse, the right to silence. Conservative Party Home Secretary went so far as to assert that “[t]he so-called right to silence is ruthlessly exploited by terrorists. What fools they think we are” (Howard, 1994: 235 Column 26). However, Professors Seidmann and Stein have demonstrated, via a game-theoretic perspective, that the perception that the right to silence helps only criminals is mistaken.

They illustrate that the right to silence actually assists in the search for truth because it helps to distinguish between innocent and guilty suspects/defendants (2000: 430-510). Any generalisation of human behaviour within the legal system leads inevitably to inequity, irrationality, and the erosion of the guiding principle of the justice system to ensure that the criminal law is rationalised so that it accords with modern democratic societal values (Phillips, 1998: 16).

To assume that silence is an act of a guilty mind is to vastly over simplify the human psyche. Quite simply there may be many factors contributing to the detainee's silence during interrogation that those captured by Bentham's ideology are blind toward - fear, anxiety, the desire to protect someone else, embarrassment, outrage, lack of clarity in thought, language barriers. Any generalisation of human behaviour in such highly charged circumstances is both imprudent and unfounded. Statistical analysis simply does not support the generalisation implicit in the Benthamite logic (see Easton, 1998: 145ff) and as such, rationality and empirical verification must replace the ASIO Act's current basis in abstraction. The majority of suspects find being in police detention extremely threatening and while in such a fearful state may be at risk of making false admissions, particularly after 48 hours of gruelling interrogation. Similarly, what might appear to be a peripheral factor in the early stages of an interrogation, and therefore not mentioned, could later transpire to be crucial to the defence. During the initial interrogation the suspect may not be aware of the full extent of the case against him, nor the legal consequences. Alternatively, a person of low IQ who did not understand the right to silence could not be expected to comprehend the importance of his confession. It was for this reason that the Royal Commission on Criminal Procedure recommended retaining the right to silence (Easton, 1998: 145ff) Amnesty raised similar concerns asserting that the provisions in the ASIO amendments would unduly impact on vulnerable detainees, including those with language difficulties and children (Senate Legal and Constitutional Committee, 2003: 6.53-6.55). Furthermore, Easton has posited that unattractive and inarticulate defendants may do themselves more harm than good by speaking, and if they speak in an unpopular dialect, may further prejudice those against them (Easton, 1998: 144-152). This factor increases in importance in the investigation of terrorism when we consider the racialist underpinnings of the "archetypal" terrorist, commonly depicted as an Islamic fundamentalist. Many detainees of Arab or Persian descent – and those following the Muslim faith generally - may fear the attachment of such

prejudice if they speak a language other than English, or with an accent. In all these circumstances it would not be ‘professional terrorists’ who would be adversely affected from the abrogation of the right to silence but the very weakest in our community; recent immigrants, persons of non-English speaking backgrounds, people with a low IQ. Inquiries into wrongful convictions have shown that the suspect’s own admission may be crucial to conviction and that it is harder for appellants to win on appeal (Easton, 1998: 144-152). It is therefore difficult to see how the innocent can be helped in any way by the abolition of the right to silence.

The example of the UK provides a historical case that illustrates the dire consequences that can result from the policy-shift against the right to silence. Contrary to its ancient common law principles, the British legislature felt that public opinion, law enforcement, and public security matters warranted an abrogation of the right to silence for the sake of prosecuting IRA members – a decision which, in some instances, was to have tragic consequences (Jackson, 1995: 587). The Runciman Commission examined the miscarriages of justice that followed from these legislative changes to the judicial protection in the cases of the Bridgewater Three, the Birmingham Six and the Guildford Four - all of which entailed the waiver of the right to silence (Easton, 1998: 170-179). In these cases, confessions obtained during interrogation were made without the right to silence, under duress, and were found to be factually defective, sometimes only years later. Yet unfortunately, our legislature has failed to heed the findings of this Commission, the injustices of which can now be repeated since the threat of imprisonment in s 34L has transformed silence into a weapon of interrogation for investigative agencies.

Unfortunately, to date no study has been undertaken to test the empirical viability and success of the anti-terror laws in the investigation and prosecution of terrorism. The Haneef affair tends to support the view that such laws have had the opposite effect to that intended, and have in fact confused police efforts rather than strengthened them. Unfortunately, since 2001, more than 30 pieces of counter-terrorist legislation have been passed through Parliament but little has been done to measure the success or practicality of these laws (Bankroft, 2006). Without such data it is hard to justify their continued operation. The need of such laws is rendered even more dubious by the fact that security reports indicate the peaceful calm of domestic Australian politics (O’Sullivan, 2006). If this is the case, then there is little need or justification for such a dramatic and oppressive amplification of the laws governing domestic

security.

Finally, we must have recourse to the principles of customary international law regarding civil and political rights. Many aspects of the ASIO Act, particularly 34L, would, *prima facie*, offend our international obligations under the Universal Declaration of Human Rights (1948: Article 2 and 11(1)), and the International Covenant on Civil and Political Rights (1966: Article 9). The Parliamentary Joint Committee produced a bipartisan advisory report critical of the human rights implications of many aspects of the anti-terror laws (Wyndham, 2003: 2) and determined that the original ASIO Amendment “would undermine key legal rights and erode the civil liberties that make Australia a leading democracy” (Parliamentary Joint Committee on ASIO, ASIS, and DSD, 2002). Along similar reasons, Amnesty International also opposed the legislation (Amnesty International, 2002) and the Senate Standing Committee for the Scrutiny of Bills questioned why protection from terrorism could only be achieved by removing legal protections such as the right to silence (2002: 7-10).

Conclusion

The fundamental question regarding the appraisal of the right to silence is that of *balance* between the interests of the community in bringing terrorists to justice and the rights and liberties of the individual. The rule of law should not be seen as a limitation on the protection of democracy but its definition, its very essence (Justice Kirby, 2001). The common position of those who seek to weaken the right to silence generally hold to Bentham’s logic, though unsupported by empirical evidence, that the right is used predominantly by the guilty. In distinction, those who seek to maintain the status of the right to silence posit that it is crucial for the protection of the innocent in the judicial process. As a democratic state with the rule of law as a primary source of political legitimation, we must remember the weak in our society who will be the most adversely affected by the loss of judicial protection.

The nature of the right to silence as a legal principle mediating the relationship between the state and citizen manifests as a yardstick from which to judge the socio-political values prevalent within the state and civil-society. As the outcome of this issue relies primarily upon the prevailing social values of the contemporary community to which it effects, the discussion is an

illuminating hallmark of the Australian community standards of ethics and the law – and the ASIO Act is a particularly sad indictment of contemporary Australian values. It is hardly surprising however, as the inexorable encroachment on civil and political freedoms has long been recognised through expansion of executive power. While some may argue that the right to silence is still sacrosanct, and that the threat of imprisonment in the exercise of the right within the ASIO Act is not indicative of compulsion, such legalistic sophistry has dubious merit in jurisprudence and is logically inconsistent precisely because it affords no *protection* to the accused. The power of a right lies solely in its ability to protect and when this capacity is undermined by fear of imprisonment the right cannot be reasonably said to be in existence any longer. Consequently, the ASIO amendment has relegated the right to silence a mere *formal* existence, an undermined judicial protection that, while not being explicitly expunged, has been significantly weakened.

It can only be speculated as to the long-term effect of this loss of the right to silence on the Australian community - the tainting of the moral authority of police investigation activities, the loss of the presumption of innocence, and the weakening of the rational model of judicial inquiry seem likely. Though the provisions contained in the ASIO amendment seem at odds with the principles and history of the Australian legal system, unfortunately, they seem anomalies that are unlikely to be corrected in the near future. To further erode the right to silence would render the relationship between the executive powers of the state and the liberties of citizens out of balance. We must remember that democracy is not just threatened by terrorism and external forces, but can be weakened from within through the acquiescence of the judiciary to the more insidious, yet less obvious, tendencies of the executive towards autocracy.

References

- Abbott, Tony (President, Law Council of Australia). (2002). "The World since September 11: Can democracy limited by the rule of law combat terrorism effectively?" (*Paper presented to the First Plenary Session of the Australian Academy of Forensic Sciences*, 13 February), 3.
- Amnesty International Australia. (2002). "Australia: Concerns Regarding Security Legislation", *Rapid Response Action*, 11 February, Amnesty Index RRA 05\02.
- Aronson, M. Hunter, J. *Litigation, Evidence and Procedure*, 6th Edition, Macmillan, Melbourne, 1998, 521.
- Bagaric, M. (1997) "The Diminishing 'Right' to Silence", 19 *Sydney Law Review*, 366-367.
- Bankcroft, M.C. (2006). "Australian parliament panel calls for independent anti-terror laws review", *Jurist*, 4 December 2006. Accessed on 5 November 2007, <http://jurist.law.pitt.edu/paperchase/2006/12/australia-parliament-panel-calls-for.php>.
- Bentham, J (1827). "Rationale of Judicial Evidence" (Ed, J.S. Mill) in (2003) *The Collected Works of Jeremy Bentham* (P. Schofield Ed.), Oxford University Press: Oxford.
- Bunning v. Cross (1978) 141 CLR 54
- Chalk, P. (1998). "The Responses to Terrorism as a Threat to Liberal Democracy", *The Australian Journal of Politics and History*, September, 44(3) 373.
- Crelinsten, R. Ozkut, I. "Reconceptualising Security Threats in a Post-Cold War, Integrated Europe: Implications for Counterterrorism and Human Rights", (*Paper presented at the Europeans Democracies Against Terrorism: Governmental Policies, Societal Responses and Supranational Cooperation in the Face of an Evolving Challenge International Workshop*, Onati, Spain, 2-3 May, 1996).

- Das, D.K. Kratcoski, P.C. (Eds.). (2003) "Counter-Terrorism, Domestic Security Developments and the Challenges of the Rule of Law in Australia", in *Terrorist Victimisation and Control*.
- Easton, Susan. (1998). *The Case for the Right to Silence*, 2nd Edition, Vermont: Ashgate Publishing, 170-179.
- Emerton, P. (2006). "Anti-terror laws erode our rights", *Monash Magazine*, May. Accessed 2 November 2007. Available at <http://www.monash.edu.au/pubs/monmag/issue17-2006/opinion/anti-terror-laws.html>
- Hocking, J. (2003) "Counter-terrorism and the criminalisation of politics: Australia's new security powers of detention, proscription and control", *The Australian Journal of Politics and History*, September, 49(3), 357.
- Howard, M. (Home Secretary). (1994), *U.K Parliament Debates*, House of Commons, 11 January, 235, Column 26.
- Jackson, J.D. (1995). "Interpreting the Silence Provisions: The Northern Ireland Cases", *Criminal Law Review*, 587.
- Kirby, Justice Michael. (2001). "Australian Law – After September 11, 2001", (Paper presented at the 32nd Australian legal Convention, Canberra, October 2001), 4-15. Accessed on 10 November 2007. Available at http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_after11sep01.htm
- Law Council of Australia. (2002). *Submission by the Law Council of Australia to the Senate Legal and Constitutional References Committee: Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002, Number 2, and Related Bills*, April.
- Lynch, A. Williams, G. (2006). *What Price Security? Taking Stock of Australia's Anti-Terror Laws*, Melbourne, Macmillan.
- Menlowe, M.A. (1988). "Bentham, Self-Incrimination and the Law of Evidence", 104 *LQR* 286, 287.
- O'Sullivan, P. (2006). "2005/2006 - The Year in Review", Accessed on 6 November 2007. Available at <http://www.asio.gov.au/Review/YearInReview.aspx>.
- Parliamentary Joint Committee on ASIO, ASIS, and DSD. (2002). *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*, May, Report 1, "Foreword".



Rice v Connolly [1962] 2 All ER 649 652.

R v Alexander [1994] 2 VR 249, 258-263.

R v. Bruce [1998] VR 579, 593.

R v. Lee (1950) 82 CLR 133.

R v Reeves (1992) 29 NSWLR 109, 115.

R v. Weissensteiner (1993) 178 CLR.

Ruddock, Phillip. (2006). "Strengthening Counter-Terrorism in Australia", *Jurist*, 20 March.

Seidman, D.J. Stein, A. (2000). "The Right to Silence Helps the Innocent: A Game Theoretic Analysis of the Fifth Amendment Privilege", *Harvard Law Review*, December, 114(2) 430-510.

Senate Legal and Constitutional Committee. (2003). *Australia Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters* (2003), Chapter 6 "Questioning", 6.53 – 6.55.

Senate Legal and Constitutional Legislation Committee. (2002). *Consideration of Legislation Referred to the Committee, Provisions of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism Bill) 2002*, June, 5.

Senate Standing Committee for the Scrutiny of Bills. (2002). *Alert Digest*, 4, 7.

Skehan, C. May, J. Dhillon, A. (2007). "Haneef case descends into farce", *Sydney Morning Herald* (Sydney), 21 July.

Smith v Director of Serious Fraud Office (1993) AC 30-31.

Sprige, T.L.S. (1987). *The Rational Foundation of Ethics*, Times Higher Education Supplement, February, 216-217.

The Age. (2005). "Lawyers unite against anti-terror laws", 5 December.

The Australian. (2007), "Haneef charged with 'supporting terrorism'", July 14.



Topsfield, Jewel. (2005) “Anti-Terror Laws Rammed Through – Minus Debate”, *The Age*, 7 December.

Wardlaw, G. (1989). *Political Terrorism: Theory, Tactics and Counter-Measures*, London, 69.

Williams, C.R. “Silence in Australia: Probative Force and Rights in the Law of Evidence” (1994) 110 *LQR* 629.

Williams, George. (2002). “One Year On: Australia’s legal response to September 11”, *Alternative Law Journal*, October, 27(5), 201-252.

Woon v R. (1964) 109 CLR 529 at [126].

Wyndham, Jessica. (2003). *Commonwealth Anti Terrorist Legislation* (Briefing Paper prepared for the Human Rights Council of Australia, March.

Zander, M. (1978). “Part I of the written evidence to the Royal Commission on Criminal Procedure”, September (Unpublished), cited in Philips, Julian. *Criminal Procedure*, (1998), Geelong: Deakin University Press.

Zander, M. Henderson, P. (1993). *Crown Court Study*, (*Royal Commission on Criminal Justice, Research Study No. 19*, London, HMSO), (1993),[1.25].